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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 115

W. P. BROWN & SONS LUMBER COMPANY,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 14, 1930

CERTIORARI GRANTED JUNE 2, 1930

(35,026)

(35,026)

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[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 9218

W. P. Brown & Sons Lumber Company, Brown Brothers Land & Lumber Company, Louisville, Ky., Petitioner,

vs.

Commissioner of Internal Revenue, Respondent

Appearances

For Taxpayer: W. W. Spalding, Esq., for Comm's: M. E. McDowell, Esq., F. B. Slosser, Esq.

Docket Entries

1925

Nov. 18. Petition received and filed.
" 20. Copy of petition served on Solicitor.
" 20. Notification of receipt mailed taxpayer.

1926

Jan. 16. Answer filed by Solicitor.
" 19. Copy of answer served on taxpayer. Assigned to General Calendar.
Sept. 22. Motion to be placed on hearing not earlier than 2/15/27 filed by taxpayer.

1927

Jan. 14. Hearing date set 3/3/27.
" 17. Application for order to take depositions of J. C. Doyle et al. filed by taxpayer.
" 17. Application for order to take depositions of P. Joyes & E. R. Clark filed by taxpayer.
" 20. Order to take depositions of Preston Joyce et al. (2) signed & filed. Both sides notified.
Feb. 9. Depositions of Preston P. Joyce, et al. filed.
" 10. Depositions of J. C. Doyle, et al. filed.
" 11. Copy of deposition served on G. C.
" 19. Motion to place on Reserve Calendar filed by taxpayer.

Feb. 10 Copy of deposition served on G. C.
" 21. Motion of 2/19/27 granted. Both sides notified.
May 19. Motion to amend filed by taxpayer. Amended petition tendered.

[fol. 2]

May. 21. Motion of 5/19/27 granted. Both sides notified.
" 24. Copy of motion and amended petition served on G. C.
June 28. Answer to amendment to petition filed by G. C. Copy served 7/1/27.
July 7. Motion to restore to Gen. Cal. for hearing upon the merits filed by G. C.
" 11. Granted. Both sides notified.
Dec. 6. Hearing date set 1/10/28.
" 23. Motion to postpone until April term filed by taxpayer.

1928
Jan. 4. Motion granted to 4/16/28.
Apr. 16. Hearing had before Mr. Love. Continued 10 days. Order of con. to 4/26/28 entered.
" 26. Hearing had before Mr. Sternhagen. Submitted. Petitioners brief due 5/28/28. Stipulation of deficiency filed.
May 2. Transcript of hearing of April 26, 1928 filed.
" 21. Brief filed by taxpayer.
Jul. 25. Memorandum opinion rendered by Sternhagen. Parties agreed to file proposed redetermination, entered.
Aug. 4. Stipulation and form of order filed.
" 10. Judgment redetermining deficiency, entered.
1929
Jan. 28. Supersedeas bond for $17,000.24 approved & ordered filed.
" 28. Petition for review by U. S. Cir. Ct. of Ap. (6) with assignments of error & proof of service filed by taxpayer.
" 29. Præcipe with proof of service thereon filed.
Feb. 12. Objections to præcipe filed by G. C.
" 25. Agreed statement lodged.
" 27. Agreed statement approved & ordered filed.

Now, March 1, 1929, the foregoing Docket Entries certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 3] BEFORE U. S. BOARD OF TAX APPEALS

PETITION—Filed Nov. 18, 1925

The above named taxpayers hereby appeal from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter (IT:CR:G-1-IK) dated October 28, 1925, and as the basis of their appeal set forth the following:

1. The parent corporation taxpayer, W. P. Brown & Sons Lumber Company, is a Kentucky corporation and the subsidiary corporation taxpayer, Brown Brothers Land & Lumber Company, is a Tennessee corporation, the principal office of both corporations being at Louisville, Kentucky. The Bureau of Internal Revenue has ruled that the taxpayers, W. P. Brown & Sons Lumber Company (herein referred to as the parent corporation) and Brown Brothers Land & Lumber Company (herein referred to as the subsidiary corporation) are affiliated corporations within the meaning of the Revenue Act.

2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer, W. P. Brown & Sons Lumber Company, on October 28, 1925.

3. The taxes in controversy are income and profits taxes for the calendar year 1917, and are more than $10,000 to wit: $31,184.47.

4. The determination of tax contained in the said deficiency letter is based upon the following errors:
The Commissioner erred:

(a) In reducing the consolidated invested capital by $115,584.14; and

(b) In fixing the March 1, 1913, value of stumpage owned at that date by the subsidiary, Brown Brothers Land & Lumber Company, for depletion purposes, at $3.00 per

thousand feet, resulting in the disallowance of depletion for 1917 of $48,184.52.

5. The facts upon which the taxpayers rely as the basis of their appeals are as follows:

On March 1, 1913, the subsidiary herein, Brown Brothers Land & Lumber Company, owned what is known as the Robe Lake timber tract, consisting of 12,336 acres of land having thereon approximately 64,000,000 feet of standing merchantable timber and 8,500,000 bolts, all of which was acquired by purchase in 1911. This tract of land is located near Brasfield, Arkansas.

The subsidiary company did not begin operating and had no income until the year 1917. Consequently, the original cost of the timber land acquired in 1911, plus the carrying charges and other expenditures which were properly capitalized up to January 1, 1917, amounted to $326,584.14, which is the cost of the property (Robe Lake timber tract) [fol. 4] for invested capital purposes. The Commissioner has erroneously reduced the cost of this property to $211,000.00, thereby reducing the invested capital by $115,584.14.

The Commissioner has also alleged that the cost of the aforementioned property and its value as of March 1, 1913, were the same and has allowed depletion at the rate of $3.00 per thousand feet on the timber consumed in operations in 1917. The fair market value at March 1, 1913, of the timber contained in the said Robe Lake tract, consisting of approximately 64,000,000 feet, plus subsequent costs properly capitalized, were not less than $561,280.00. The footage cut in 1917 was 8,345,000 feet, the fair market value of which on March 1, 1913, plus such subsequent capitalized costs were not less than $73,219.52, which amount should be allowed as a deduction for depletion in 1917. The Commissioner has allowed only $25,035.00.

Under date of March 6, 1923, the Bureau of Internal Revenue addressed a letter to the parent taxpayer, W. P. Brown & Sons Lumber Company, advising it of a deficiency in taxes for 1917 of the following amounts:

W. P. Brown & Sons Lumber Company	$38,035.46
Brown Brothers Land & Lumber Co.	15,831.49
A total deficiency of	$53,866.95

In the said letter taxpayers were advised that in accordance with the provisions of Section 250 (d) of the Revenue Act of 1921, they would be granted thirty days within which to file an appeal. Within thirty days from the date of said letter taxpayers filed their appeal to the Commissioner of Internal Revenue, to-wit, on April 2, 1923, protesting the findings of the Commissioner as disclosed in his letter of March 6, 1923. Before the expiration of the thirty day period from March 6, 1923, the Commissioner made jeopardy assessments of the entire amount of additional taxes ($53,866.95) stated above, and these taxpayers thereupon filed abatement claims for the total amount so assessed, which were accepted by the Collector. The abatement claims and the appeal of the taxpayers were sent by the Income Tax Unit to the Committee on Appeals and Review under date of June 4, 1924, and the decision thereon by the Commissioner is evidenced by the letter of October 28, 1925, copy of which is attached. This letter evidences the final determination by the Commissioner of the 1917 deficiency.

[fol. 5] 6. The taxpayers, in support of their appeal, rely upon the following propositions of law:

That the taxpayers are entitled to include in their consolidated invested capital the cost of said assets; that they are also entitled to a deduction for depletion, based upon the fair market value of the timber at March 1, 1913; and that the Commissioner erred, as a matter of law, in reducing the invested capital below actual cost and in fixing the March 1, 1913, value of the timber at an amount less than its fair market value on that date.

Wherefore, the taxpayers respectfully pray that this Board may hear and determine their appeal.

W. W. Spalding, Counsel for Taxpayers, Woodward Building, Washington, D. C.

Duly sworn to by Preston P. Joyes. Jurat omitted in printing.

EXHIBIT TO PETITION

Copy

Mailed October 28, 1925.

IT:CR:G-1; IK

W. P. Brown & Sons Lumber Company, 1522 South 6th Street, Louisville, Kentucky.

SIRS: A reexamination of your income and excess profits tax returns for the year 1917 discloses over-assessments [fol. 6] aggregating $22,682.48, as shown in the attached statements and accompanying schedules.

The overassessments shown herein will be made the subject of Certificates of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281 (a) of the Revenue Act of 1924.

Payment should not be made on the rejected portions of your claims in abatement until a bill is received from the Collector of Internal Revenue for your district and payment should then be made to him.

Respectfully, (S.) C. R. Nash, Assistant to the Commissioner, by (S.) H. D. Robinson, Head of Division.

dp-5.

Schedule 1

IT: CR: G-1; IK.

Summary of Returns Examined and Resulting Tax Liability. Returns Examined

Company	Year	Form	Date filed
W. P. Brown & Sons Lumber Company (Partnership)	1917	1065-1102	April 1, 1918
Brown Bros. Land & Lumber Co., Memphis, Tenn.	1917	1031-1103	April 1, 1918
N. L. Horrall Lumber Co., Indianapolis, Ind.	1917	1031	April 1, 1918

Tax Liability

Company	Year	Overassessment
W. P. Brown & Sons Lumber Company	1917	$18,533.75
Brown Bros. Land & Lumber Company	1917	4,148.73
Total		$22,682.48

The decisions arrived at in conference held in this office November 22, 1923 as a result of your protest of office letter [fol. 7] dated March 5, 1923, have been made the basis of the adjustments shown herein.

In the determination of the corrected tax liability due consideration has been given to the statements made in connection with your claims filed as follows:

Company	Year
W. P. Brown & Sons Lbr. Co.	1917
Brown Bros. Land & Lbr. Co.	1917

Claim	Date filed	Amount
Abatement	Mar. 27, 1923	$38,035.46
"	June 1, 1923	15,831.49

Waivers which will expire December 10, 1925, are on file for the year 1917.

Inasmuch as all assessments of your tax were made prior to the enactment of the Revenue Act of 1924, and as the adjustments herein set forth do not result in a deficiency as defined in Section 273 thereof, the findings hereunder may not form the basis of an appeal to the United States Board of Tax Appeals.

W. P. Brown & Sons Lumber Company. Year ended December 31, 1917.

Schedule 2

Net Income

Net income as disclosed by office letter dated March 5, 1923	$207,447.76
As corrected	159,114.19
Deductions	48,333.57

Deductions:

(a) T. M. Brown's Personal Account	$6,229.30	
(b) J. G. Brown Personal Account	6,766.51	
(c) Miscellaneous Expenses	1,900.00	
(d) Donations	2,893.86	
(e) Depreciation	30,543.90	
Total deductions		$48,333.57

Explanation of Items Changed

(a) (b) (c) and (d) These items previously disallowed are now allowed on the basis of decisions reached at a con- [fol. 8] ference held in this office November 2, 1923.

(e) The depreciation is recomputed on the basis of the rates agreed upon with respect to the Brashfield Logging Equipment and Brasfield Saw Mill. The amounts claimed with respect to the remaining items of plant and equipment as outlined in your appeal dated November 7, 1923, are allowed as claimed.

Depreciation claimed in your brief			$46,177.70
Adjustment of Steel Rails:			
Depreciation claimed:			
Cost	$7,000.00	$700.00	
Salvage 50%	3,500.00		
Depreciable at 10%	$3,500.00	350.00	
Depreciation on Steel rails disallowed			$350.00
Depreciation allowable			$45,827.70
Depreciation allowed in letter dated March 5, 1923			15,283.80
Depreciation, additional			$30,543.90

Brown Brothers Land & Lumber Company. Year ended Dec. 31, 1917.

Schedule 3

Net Income

Net income as disclosed by office letter dated March 5, 1923	$49,515.71
As corrected	43,899.07
Deduction Levee tax	5,526.64

Explanation of Items Changed

(a) Levee taxes are allowed in accordance with the decision made in conference after consideration of the certificate from the Secretary of the White River Levee District showing the percentage of expenditures by that district on account of interest and maintenance to have been eighty-eight percent.

Levee tax previously disallowed	$6,280.27
Proportion unallowable as deduction from income 12% of above	753.63
Amount allowance	$5,526.64

[fol. 9] Schedule 4

Consolidated Net Income—1917

Net income as corrected:		
W. P. Brown & Sons Lumber Company Schedule 2	$159,114.19	
Brown Bros. Land & Lumber Company, Schedule 3	43,989.07	
Total		$203,103.26
Net loss as corrected: N. L. Horrall Lumber Co. (reported)		2,748.09
Consolidated net income for excess profits tax purposes		$200,355.17

W. P. Brown & Sons Lumber Company. Year ended December 31, 1917.

Schedule 5

Invested Capital

Invested capital disclosed by office letter dated March 5, 1923	$696,017.42
As corrected	612,017.42
Reduction January 1, 1914 value	84,000.00

Explanation of Items Changed

After careful consideration of your protest with respect to the March 1, 1913 value and depletion of timberlands, the Bureau has arrived at the following value, which is also applicable to the computation with respect to your January 1, 1914 value for the reason that the original issue of stock of the Robe Lake Lumber Company in 1911, of which your company is a continuation, was in payment of this property. Inasmuch as the depletion rate is not changed from that previously allowed, and because the difference in value arrived at in this computation is in the reduction in the estimate of available footage at the basic date, the difference in value is eliminated from invested capital. Subsequent depletion sustained does not affect the result.

[fol. 10] Value previously allowed letter of March 5, 1923		$295,000.00
Corrected value: 12336 acres at $2.02 per acre	$25,000.00	
62000M feet B. M. at 3.00 per M	186,000.00	211,000.00
Reduction in invested capital		$84,000.00

W. P. Brown & Sons Lumber Company. Year ended December 31, 1917.

Schedule 6

Computation of Tax, 1917 Act—Excess Profits Tax.
Corporation

Net income subject to Excess Profits Tax Sch 4	$200,355.17
Invested capital Sch. 5	612,017.42
Variable deduction 9%	55,081.57
Specific exemption	6,000.00
Total deduction	$61,081.57

	Income	Deductions	Balance	Rate	Tax
15%	$91,602.61	$61,081.57	$30,721.04	20	$6,144.21
5%	30,600.87		30,600.87	25	7,650.22
5%	30,600.87		30,600.87	35	10,710.31
Bal.	47,350.82		47,350.82	45	21,307.87
Total	200,355.17	61,081.57	139,272.60		45,812.61

Allocation of Tax

Name of company	Per cent	Amount
W. P. Brown & Sons Lumber Co	79	$36,191.96
Brown Bros. Land & Lumber Co.	21	9,620.65

Schedule 7

Computation of Tax 1917—Total Tax (Partnership)

	Income	Tax
Taxable net income, Sch. 2	$159,114.19	
Deduct: Excess profits tax Sch. 6..	36,191.96	$36,191.96
Balance not subject to normal tax	122,922.23	
[fol. 11] Total Tax Liability		36,191.96
Previously assessed:		
April 1918 P. 69, L. 3	16,690.25	
March 1923, Spl. 7, P. O. L. O	38,035.46	
		54,825.71
Overassessment		$18,533.75

Claim for abatement in the amount of $38,035.46 filed March 27, 1923.

Brown Brothers Lands & Lumber Company.

Schedule 8

Computation of Tax, 1917—Total Tax

	Income tax	
Taxable net income, Sch. 3..	$43,989.07	
Deduct: Excess Profits Tax, Sch. 6	9,620.65	$9,620.65
Taxable at 2%	34,368.42	687.37
Taxable at 4%	34,368.42	1,374.74
Total Tax Liability		11,682.76
Previously assessed: March 1923 Special 6, Page 6, Line 5		15,831.49
Overassessment		4,148.73

Claim for abatement in the amount of $15,831.48 filed June 1, 1923.
dp-5.

Now, March 1, 1929, the foregoing Petition certified from the record as a true copy.
B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 12] BEFORE U. S. BOARD OF TAX APPEALS

ANSWER—Filed Jan. 16, 1926

Now comes the Commissioner of Internal Revenue by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and for answer to each paragraph of the taxpayer's petition admits and denies as follows:

1. Admits the allegations of fact contained herein.

2. Admits that on October 28, 1925, the Commissioner mailed to the taxpayer a letter, a copy of which is attached to the petition, but denies that the said letter constitutes a deficiency letter within the meaning of Section 274 of the Revenue Act of 1924.

3. Admits the allegations of fact contained herein.

4. Denies that the Commissioner has committed any errors in arriving at the tax liability of the appellant for the calendar year 1917.

5 (sub-paragraph 1). Admits that on March 1, 1913, the subsidiary herein, Brown Brothers Land and Lumber Company, owned what is known as the Robe Lake Timber Tract consisting of 12,336 acres of land; denies that there was on the land approximately 64,000,000 feet of standing merchantable timber and 8,500,000 bolts; denies that the said land was acquired by purchase in 1911; admits that the tract of land in question is located near Brasfield, Arkansas.

5 (sub-paragraph 2). Denies all the allegations of fact contained herein.

5 (sub-paragraph 3). Admits that the Commissioner has allowed depletion at the rate of $3.00 per thousand feet on the timber consumed in operation in 1917, but denies that the Commissioner has alleged that the cost of the aforementioned property and its value as of March 1, 1913, were the same; denies that the fair market value at March 1, 1913, of the timber contained in the said Robe Lake tract consisted of approximately 64,000,000 feet, or that its March 1, 1913, value was $561,280.00, or any other value in excess of $211,000.00; admits that the footage cut in 1917 was 8,345,000 feet, and denies that the fair market value of such footage on March 1, 1913, plus subsequent capitalized costs was $73,219.52, or any other amount in excess of $25,035.00; and admits that the Commissioner as allowed depletion for the calendar year 1917 in the amount of $25,035.00.

5 (sub-paragraph 4). Admits all the allegations of fact contained herein.

5 (sub-paragraph 5). Admits all the allegations of fact contained herein, except the last sentence thereof reading: [fol. 13] "This letter evidences the final determination by the Commissioner of the 1917 deficiency," which allegation is specifically denied.

6. Denies generally and specifically each and every allegation of fact contained in the taxpayer's petition not hereinbefore admitted qualified or denied.

Before U. S. Board of Tax Appeals

Propositions of Law

1. The depletion allowed this taxpayer is in accordance with Section 12(a) Second of the Revenue Act of September 8, 1916, as amended by the Revenue of October 3, 1917.

2. The taxpayer's invested capital has been correctly computed in accordance with Section 207 of the Revenue Act of October 3, 1917.

Wherefore, it is prayed that the taxpayer's appeal be denied.

A. W. Gregg, Solicitor of Internal Revenue, Attorney for Commissioner of Internal Revenue. Of Counsel: Arthur J. Seaton, Special Attorney, Bureau of Internal Revenue.

Now, March 1, 1929, the foregoing Answer certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal)

[fol. 14] BEFORE U. S. BOARD OF TAX APPEALS

AMENDMENT TO PETITION—Filed May 19, 1927

Now comes the above-named petitioners and by leave of the Board of Tax Appeals file this, their amendment to the petition, and allege as follows:

Any and all liability for any part of the deficiency involved in this proceeding has been extinguished by the statute of limitations, for the following reasons:

The petitioners herein filed in 1918 their income-profits tax returns for the calendar year 1917. During the month of March, 1923, respondent assessed additional taxes of $53,866.95 against the petitioners, as follows:

W. P. Brown & Sons Lumber Company	$38,035.46
Brown Brothers Land & Lumber Company	15,831.49
Total deficiency assessed	$53,866.95

Upon receipt of notice and demand for the payment of these additional taxes, abatement claims were duly filed with and accepted by the Collector of Internal Revenue for the entire amount of the deficiency. Under date of October 28, 1925, more than five years after the date on which the returns for 1917 were filed, respondent addressed a letter (a copy of which is attached to the original petition) to the petitioners, wherein petitioners were advised that of the additional taxes of $53,856.95 assessed in March, 1923, $22,682.48 would be abated and that the claims for abatement would be rejected for the balance of $31,184.47.

No suit or proceeding for the collection of such balance or any part thereof has been instituted or begun by respondent.

In view of the foregoing facts, all liability for the deficiency involved in this proceeding has been extinguished by the statute of limitations, which is now pleaded and relied upon in bar of the determination of said deficiency, or any part thereof.

Wherefore, the petitioners pray as in their original petition, that it be held by the Board that all liability for said deficiency has been extinguished by the statute of limitations, and for such other relief as may appear equitable and proper as this cause progresses.

W. W. Spalding, Counsel for Petitioners, Woodward Building, Washington, D. C.

[fol. 15] *Duly sworn to by J. G. Brown. Jurat omitted in printing.*

Now, March 1, 1929, the foregoing Amendment to Petition certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

Before U. S. Board of Tax Appeals

Answer to Amendment to Petition—Filed June 28, 1927

Now comes the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, and for answer to the amendment to the petition of these petitioners, admits and denies as follows:

Admits that the petitioners filed in 1918 their income and profits tax returns for the calendar year 1917 and that [fol. 16] during the month of March, 1923, the respondent assessed additional taxes of $53,866.95 against the petitioners as follows:

W. P. Brown & Sons Lumber Company	$38,035.46
Brown Brothers Land & Lumber Company	15,831.49
Total deficiency assessed	$53,866.95

Admits that upon receipt of notice and demand for payment of said additional taxes abatement claims were filed with and accepted by the Collector of Internal Revenue for the entire amount of the deficiency and that under date of October 28, 1925, the respondent addressed a letter to the petitioners advising them that of the additional taxes of $53,866.95 assessed in March, 1923, $22,682.48 would be abated and that the claims for abatement would be rejected for the balance of $31,184.47.

Denies that all liability for the deficiency involved in this proceeding has been extinguished by the statute of limitations.

Denies, generally and specifically, each and every allegation of error or of fact contained in the taxpayer's amendment to petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the taxpayers' amendment to petition be denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel: Maxwell E. McDowell, Special Attorney, Bureau of Internal Revenue.

Now, March 1, 1929, the foregoing Answer to Amendment to Petition certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

[fol. 17] BEFORE U. S. BOARD OF TAX APPEALS

MEMORANDUM OPINION

W. W. Spalding, Esq., for the petitioner.

Maxwell E. McDowell, Esq., and Frank B. Slosser, Esq., for the respondent.

STERNHAGEN:

This proceeding originally presented three issues, two of which affected the merits of the Commissioner's determination of deficiencies, and the third presented the question whether the deficiencies were barred by the limitation provisions of the statute. At the hearing the parties agreed

to dispose of the first two issues and stated that the amount of the deficiencies was agreed upon in the event that the Board should decide that the statute of limitations had not extinguished the liability. It remains, therefore, only to consider whether the deficiencies are barred.

The taxable year in question is 1917, and for that year the petitioners, t*go*ether with another corporation, have been treated as affiliated and their tax liability thus considered as upon a consolidated return. It appears to have been assumed that the returns for 1917 were duly filed in or about March, 1918. Thereafter the taxpayers signed waivers of all statutory time limitations for assessment. These signed waivers are stamped as having been received by the Commissioner, December 13, 1920, and were signed by the Commissioner under date of December 2, 1922. The period of extension was not limited.

In March, 1923, additional taxes for 1917 were assessed against both corporations, and abatement claims were filed.

On or about December 15, 1923, the petitioners and the respondent signed written consents in writing to a determination, assessment, and collection of any taxes due for 1917 and 1918, to remain in effect for one year from the date signed by the taxpayer. Thereafter, on October 25, 1924, the W. P. Brown & Sons Lumber Company, and the Commissioner signed a further consent in writing for a determination, assessment, and collection of the 1917, 1918, and 1919 taxes, to remain in effect for one year after the expiration of any statutory period or period of any waivers already on file.

These facts are substantially similar to those of G. L. Ramsey, B. T. A., (April 2, 1928) in which the Board held that the six-year provision of section 278(d) of the Revenue Act of 1924, applied to a 1917 tax of which the period for collection had by waivers been extended to a date subsequent to June 2, 1924, when the statute was enacted. In [fol. 18] the present case the situation is parallel, and we therefore follow the precedent of the Ramsey decision and hold that the deficiencies for 1917 are not barred by the statute.

In accordance with the statement made by the parties at the hearing, they will be expected to agree upon and file a proposed order of redetermination.

Entered Jul. 25, 1928.

A true copy: Teste.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1929, the foregoing Memorandum Opinion certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.

(Seal.)

Before U. S. Board of Tax Appeals

Stipulation and Form of Order—Filed Aug. 4, 1928

Now come the parties to the above-entitled appeal and, by their respective attorneys in accordance with the agreed statement of account submitted at the hearing and marked for record at page 4 of the transcript and in accordance with the instructions of the Board's Memorandum Opinion entered herein on July 25, 1928, agree that the Board may enter its final order of redetermination in the following form:

Order of Redetermination and Judgment

The above-entitled action came on for hearing on April 26, 1928. Now upon the stipulated agreement of record and upon consideration of the premises herein and in accordance with the opinion heretofore promulgated on July 25, 1928, it is

[fol. 19] Ordered, Adjudged and Determined: That for the year 1917 there is a deficiency in payment of $3,498.27 and an unpaid assessment to be abated in the amount of $11,140.93 with respect to the petitioner W. P. Brown and Sons Lumber Company and that for the year 1917 there is a deficiency in payment of $5,001.85 and an unpaid assessment to be abated in the amount of $6,680.91 with respect to the petitioner Brown Brothers Land and Lumber Company.

This stipulation is submitted in accordance with the decision of the Board without prejudice to the petitioner's right to contest the correctness of the decision pursuant to the statute in such cases made and provided.

W. W. Spalding, Counsel for Petitioner. (Signed) C. M. Charest, General Counsel, Bureau of Internal Revenue.

Now, March 1, 1929, the foregoing Stipulation & Form of Order certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

JUDGMENT

Pursuant to the Board's report in the above entitled proceeding, entered July 25, 1928, and the stipulation of the parties filed August 4, 1928, it is

Ordered, Adjudged and Decided that as to the petitioner W. P. Brown & Sons Lumber Company, for 1917, there is a deficiency in payment of $3,498.27, and an unpaid assessment to be abated in the amount of $11,140.93, and as to the petitioner Brown Brothers Land & Lumber Company, for 1917, there is a deficiency in payment of $5,001.85, [fol. 20] and an unpaid assessment to be abated in the amount of $6,680.91.

A True Copy. Teste:

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

Entered Aug. 10, 1928.

Enter

(Signed) John M. Sternhagen, Member, United States Board of Tax Appeals.

Now, March 1, 1929, the foregoing Judgment certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

PETITION FOR REVIEW IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT—Filed Jan. 23, 1929

Now come appellants, W. P. Brown & Sons Lumber Company and Brown Brothers Land & Lumber Company affiliated corporations, by their attorney, W. W. Spalding, and respectfully represent as follows:

I

W. P. Brown & Sons Lumber Company and Brown Brothers Land & Lumber Company are corporations, organized and existing under and by virtue of the laws of States of the United States, with principal offices and place of business at Louisville, Kentucky. The income-profits tax returns of appellants for 1917 were made to the Collector of Internal Revenue at Louisville, Kentucky, who has an office in that City, which is within the jurisdiction of the United States Circuit Court of Appeals for the Sixth Circuit. Hon. David H. Blair is the duly appointed, [fol. 21] qualified and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States.

II

The nature of the controversy is as follows, to-wit:

The correct determination of income and excess profits taxes due and owing by the appellants, as affiliated corporations, for the calendar year 1917.

For that calendar year (1917), appellants duly filed with the Collector of Internal Revenue at Louisville, Kentucky, their consolidated income and excess profits tax returns in March, 1918. In said returns, the appellants endeavored to report their true and correct consolidated invested capital and their true taxable income, and paid when due all income and excess profits taxes shown thereon, to said Collector of Internal Revenue at Louisville, Kentucky.

The first provision of any of the Revenue Acts of the United States, under which the time for assessment and collection of taxes could be extended beyond the statu-

tory period for making such assessment and collection, is in Section 250(d) of the Revenue Act of 1921. This section provides that assessment of any income-profits taxes for 1917 shall be made within five years after the return for that year was filed, and no proceeding in distraint or in Court shall be begun for the collection thereof after five years from the date such return was filed, unless the Commissioner and the taxpayer shall agree in writing to a later determination, assessment, and collection of such taxes. The proper construction of this section, as appellants are advised and believe, is that any such consent, to be effective, must be given before the expiration of the statutory period of limitation, viz., five years from the date of the filing of the return.

The appellants herein did not, prior to the expiration of the period of limitations, fixed by Section 250(d) of the Revenue Act of 1921, agree with the Commissioner of Internal Revenue, or consent in writing, to a later collection of additional taxes due from them for the calendar year 1917.

On or about the first day of March, 1923, the Commissioner of Internal Revenue made additional assessments of income-profits taxes against appellants for 1917, in the amount of $38,035.46 against appellant W. P. Brown & Sons Lumber Company, and in the amount of $15,831.49 against appellant Brown Brothers Land & Lumber Company. However, said additional assessments were not col- [fol. 22] lected within said five-year period, and within that period no proceedings in distraint or in Court for the collection of said additional assessments, or either of them, were instituted by appellee or any of his representatives.

On or about December 10, 1923, after the period for the collection of said additional assessments had expired, the Commissioner of Internal Revenue, under a misapprehension of law and fact, mailed to appellants, for them to sign, a printed form which purported to be a consent in writing for the assessment and collection of additional taxes for the calendar year 1917, at a later date than provided by law, viz., five years after the return was filed. Appellants, also under a misapprehension of law and fact, signed said writing and returned the same to the said Commissioner of Internal Revenue, on or about December 15,

1923. By its terms said writing expired one year after the date on which it was signed by appellants.

Thereafter, to-wit, on or about October 25, 1924, one of the appellants only, W. P. Brown & Sons Lumber Company, signed a further consent in writing for a determination, assessment, and collection of said taxes within one year after the expiration of any statutory period or period of any waiver already on file. This last named consent was not signed or given by appellant, Brown Brothers Land & Lumber Company; and the only waiver or consent given to appellee by that company, relating to collection, was that given on or about December 15, 1923, referred to above.

Relative to these waivers or consents, appellants are advised as follows:

(a) They are ineffective because given after the expiration of the statutory period for making collection of 1917 income-profits taxes assessed prior to June 2, 1924.

(b) The waiver of December 15, 1923, expired by its terms in December, 1924, which was before the mailing of the deficiency notice in the present case.

(c) The waiver of October 25, 1924, expired by its terms in December, 1925. It did not affect appellant, Brown Brothers Land & Lumber Company; and appellants now raise the additional question of whether the statutory period of collection was extended by the mailing of the deficiency notice of October 28, 1925.

On October 28, 1925, appellee mailed to appellants a 60-days' deficiency notice, as provided by Section 274 of the Revenue Act of 1924, in which notice he rejected and denied the claims for abatement filed against said addi- [fol. 23] tional assessments to the extent of $19,501.71 in the case of appellant W. P. Brown & Sons Lumber Company, and to the extent of $11,682.74 in the case of appellant Brown Brothers Land & Lumber Company, the remainder of said abatement claims being allowed.

Within sixty days after the receipt of said notice of deficiency, appellants filed their petition for an appeal to the United States Board of Tax Appeals, from appellee's determination set forth therein.

III

In their petition for appeal to the United States Board of Tax Appeals, appellants assigned errors and contended that at the time said deficiency notice was mailed to them and on every date thereafter, the taxes proposed to be collected were barred by the statute of limitations.

Said proceeding came on for hearing before the United States Board of Tax Appeals on June 25, 1928; and shortly thereafter the Board made findings of fact and issued a memorandum opinion to the effect that the taxes proposed to be collected were not barred by the statute of limitations.

IV

Thereafter, to-wit, on August 10, 1928, the United States Board of Tax Appeals entered its final order of redetermination, in which it ordered, adjudged, and decided that as to the appellant W. P. Brown & Sons Lumber Company, for the year 1917, there is a deficiency in payment of $3,498.27, and an unpaid assessment to be abated in the amount of $11,140.93; and as to the appellant Brown Brothers Land & Lumber Company, for the year 1917, there is a deficiency in payment of $5,001.85, and an unpaid assessment to be abated in the amount of $6,680.91.

V

The appellants, being aggrieved by the findings of fact and decision of the United States Board of Tax Appeals, desire to obtain a review thereof by the United States Circuit Court of Appeals for the Sixth Circuit.

Wherefore, appellants pray that a transcript of record be prepared in accordance with the rules of said United States Circuit Court of Appeals for the Sixth Circuit, and transmitted to the Clerk of said Court for filing and for appropriate action, to the end that the errors complained of may be reviewed and corrected by the United States Cir-[fol. 24] cuit Court of Appeals for the Sixth Circuit.

VI

Appellants aver that there was and is manifest error in the findings of fact and decision of the United States Board of Tax Appeals, and now make the following assignment of errors for the review thereof:

1. The United States Board of Tax Appeals erred in holding that the appellant and the Commissioner of Internal Revenue could, under the provisions of Section 250 (d) of the Revenue Act of 1921, after the five-year period for making assessment and collection of taxes had expired, extend the period for a later determination, assessment, and collection thereof.

2. The United States Board of Tax Appeals erred in holding and concluding, as a matter of law, that the collection of the deficiencies proposed against appellants for the year 1917 were not barred by the statute of limitations at the time the consents of December 15, 1923, and October 25, 1924, were executed; also, at the time the deficiency notice of October 28, 1925, was mailed to appellants; and, finally, at the time the order of redetermination herein was entered.

3. The United States Board of Tax Appeals erred in not finding, from the wording of the first of the two waivers herein involved, that it expired prior to the mailing of the deficiency notice and was never renewed by appellant Brown Brothers Land & Lumber Company, thereby relieving that company of all liability for any part or all of the additional assessment against it for 1917.

4. The United States Board of Tax Appeals erred in not finding that prior to the promulgation of its decision and the making of the redetermination herein the second waiver herein involved given solely by W. P. Brown & Sons Lumber Company expired in accordance with its terms and therefore became wholly ineffective.

5. The United States Board of Tax Appeals erred in not finding that both said waivers were signed and delivered by the appellants signatory thereto under a misapprehension of law and fact.

(Signed) W. W. Spalding.

STATE OF KENTUCKY
County of Jefferson ss:

J. G. Brown makes oath in due form of law and says that he is the President of the appellant corporations in the fore-[fol. 25] going petition for review; that he has read the foregoing petition and is acquainted with the facts stated

therein and that they are true to the best of his knowledge, information and belief; and that he verily believes that the petitioner is entitled to the relief sought by review of the findings of fact and decision of the United States Board of Tax Appeals rendered June 25, 1928, and final order entered August 10, 1928.

(Signed) J. G. Brown.

Subscribed and sworn to before me by J. G. Brown this 12 day of January, 1929.

(Signed) M. Burke, Notary Public. (Seal.) My commission expires Aug. 26, 1930.

Service of the foregoing petition is acknowledged this the 21st day of January, 1929.

(Signed) C. M. Charest, General Counsel of Internal Revenue, Attorney for Appellee.

Now, March 1, 1929, the foregoing Petition for Review with proof of service certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

Before United States Board of Tax Appeals

Statement of Evidence—Filed Feb. 27, 1929

At the hearing of the above entitled proceeding on April 26, 1928, before Hon. John M. Sternhagen, presiding member, the following proceedings were had, evidence presented, stipulations made, and rulings made by the presiding member.

[fol. 26] At the hearing the petitioners were represented by W. W. Spalding; the respondent by Maxwell E. McDowell, Frank B. Schlosser, and C. M. Charest, General Counsel of Internal Revenue.

Colloquy

The following is a statement of the proceedings:

Mr. Spalding: If your Honor please, this case is prepared for hearing on the merits. Depositions were taken,

and after they were taken the Bureau of Internal Revenue made another inspection of the timber lands of this company located in the south, and as a result of that inspection we have been able to reach an agreement with the General Counsel's office regarding the amount of the deficiency, provided the question of limitation be decided adversely to the taxpayer.

That leaves in the case only the question of limitation, and we have agreed, Mr. McDowell and Mr. Schlosser on the one hand and I on the other, that we will submit to your Honor a statement of the deficiency, conditioned by the decision of the Board on the limitation question.

I therefore hand in the stipulation as to the amount of the deficiency, conditioned upon the decision on the limitation question. Of course, if the Board holds our way on the limitation question there will be no tax.

The Member: In other words, you say that any deficiency is barred by the statute of limitations in the statute, but that if it is not barred then the disposition of the case on the merits is to be in accordance with this stipulation.

Mr. Spalding: Yes.

Mr. McDowell will read into the record the facts relative to the limitation question, the date of filing of the return, the date of the assessment, the date of the waivers, etc.

The Member: Before you do that, this paper that you have just handed up here is simply entitled, "Statement of Account," and is a carbon copy of some figures, but it does not purport to be a stipulation. It is not signed by anybody.

Mr. McDowell: If your Honor please, rather than read that into the record and take the danger of errors that might creep in, we felt that our agreement appearing as of record under the statement of counsel here this morning supplemented by those figures, would constitute a valid stipulation.

The Member: That is all right. If what Mr. Spalding has just said, which, as I understood, was by way of a statement to the Board as to the situation, rather than a formal stipulation, if what he has just said is the expres-
[fol. 27] sion of an agreement between the two of you, it now appears in the record. That is true, is it?

Mr. McDowell: The respondent so regards that and agrees the statement made by counsel is agreed to by the respondent.

The Member: I do not want to have this general statement subject to difficulties which might be avoided if you had formally stated it in the form of a stipulation.

Mr. Spalding: Let me say this: We would have done that except for the fact we were delayed, both Mr. McDowell and I, by the failure of the income tax unit to compute that. They were delayed. They just gave us that a day or two ago.

The Member: Let this paper be marked as filed at the hearing.

The said paper was in words and figures as follows:

EXHIBIT

"Statement of Account

W. P. Brown & Sons Lumber Company

1917

Total tax assessed:		
Original	$16,690.25	
Additional	38,035.46	
		$54,725.71
Less: Overassessment allowed		18,533.75
Net assessment		$36,191.96
Tax paid	$16,690.25	
By credit	4,862.51	
Total payment		$21,552.76
Correct tax liability		$25,051.03
Deficiency in payment		$ 3,498.27
Unpaid assessment to be abated		$11,140.93
Total tax assessed		$15,831.49
Less: Overassessment allowed		4,148.73
Net assessment		$11,682.76
Tax paid		None
Correct tax liability		5,001.85

Deficiency in payment	5,001.85
Unpaid assessment to be abated	6,680.91"

Mr. McDowell: With respect to the question of the statute of limitations raised in the amended pleading in this hearing, or in this appeal, the parties have agreed that the [fol. 28] following is an agreed statement between them, and submit it to the Board as a correct statement of the facts material for the Board's determination of that issue.

The companies in this statement will be referred to as Company No. 1 and Company No. 2. Company No. 1 is the W. P. Brown & Sons Lumber Company. Company No. 2 is the Brown Brothers Land & Lumber Company.

The return for the year 1917 of Company No. 1 was filed on April 1, 1918.

The return for the same year 1917 of Company No. 2, was filed on March 30, 1918.

On December 13, 1920, both Companies No. 1 and No. 2 filed unlimited waivers for the assessment of taxes in the year 1917. These waivers were signed by the Commissioner on December 2, 1922. It is the intention of the parties to submit in supplement of this statement the original of all waivers referred to in the statement.

In the month of March, 1923, an assessment was listed against Company No. 1, in the sum of $38,035.46 and in the same month of March, 1923, an assessment was listed again Company No. 2, in the sum of $15,836.49.

Company No. 1 filed a claim in abatement for the total amount of the assessment against it of $38,035.46 under date of March 27, 1923.

Company No. 2 filed a similar claim in abatement in the assessment of $15,836.49 on June 1, 1923.

Waivers of assessment and collection of the tax were filed by both companies extending the period for such assessment and collection to December 10, 1924, under date of December 14, 1923.

The Member: They will be put in evidence, will they, the originals?

Mr. McDowell: Yes, sir. They will be so submitted.

Company No. 1 on October 25, 1924, filed a waiver of assessment and collection of the 1917 tax, extending the period to December 10, 1925.

On October 28, 1925, a deficiency letter was mailed by the Commissioner to Company No. 1, showing the Commissioner's action on the claim on abatement filed by this Company and stating an overassessment of $18,533.75.

On the same date, October 28, 1925, a similar deficiency letter was sent to Company No. 2, showing an overassessment of $4,148.73.

This appeal filed by both Companies No. 1 and No. 2 was filed with the Board on November 18, 1925.

I submit the first waiver referred to assessment filed on December 13, 1920, by Company No. 1 as joint Exhibit No. 1.

[fol. 29] The Member: That will be received in evidence as joint exhibit No. 1.

(Said document, "Joint Exhibit No. 1," was in words and figures as follows:

JOINT EXHIBIT No. 1

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence April 26, 1928. Received Dec. 13, 1920, Natural Resources Sub-Division.

IT:SA:NR.

Waiver

W. P. Brown & Sons Lumber Company, a corporation, organized under the laws of the State of Kentucky, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, for the year ended December 31, 1917, on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may

be made against it for said year by the officials of the Income Tax Unit.

W. P. Brown & Sons Lumber Co. (Signed) Per J. G. Brown, Pres. (S.) Corporation. Seal.) (Corporate Seal.)

Approved Dec. 2, 1922. D. H. Blair (S.) Commissioner of Internal Revenue."

Mr. McDowell: I submit the second waiver referred to filed on December 13, 1920, by Company No. 2, as "Joint Exhibit No. 2."

(Said document, "Joint Exhibit No. 2," was in words and figures as follows):

[fol. 30] JOINT EXHIBIT #2

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence April 26, 1928. Received Dec. 13, 1920. Natural Resource Sub-Division.

IT:SA:NR.

Waiver

Brown Bros. Land and Lumber Company, a corporation, organized under the laws of the State of Tennessee, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917, for the year ended December 31, 1917 on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

Brown Bros. Lumber Co. (S.) (Signed) J. G. Brown, V. Pres., Corporation, by —— —— (Title). (Corporate Seal.)

Approved Dec. 2, 1922. D. H. Blair (S.) Commissioner of Internal Revenue."

Mr. McDowell: I submit the waiver of Company No. 1, filed on December 14, 1923, as "Joint Exhibit No. 3."

(Said document, "Joint Exhibit No. 3," reads in words and figures as follows):

[fol. 31] JOINT EXHIBIT #3

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence April 26, 1928. Received Dec. 14, 1923, Engineering Div. Dec. 10th, 1923. (Date.)

IT:EN:T.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, W. P. Brown and Sons Lumber Company of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918, under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

W. P. Brown & Sons Lumber Co. (S.), by Preston P. Joyes, Treas. (Seal.) D. H. Blair, (S.) Commissioner."

Dec. 15, 1923.

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the law of the State in which the corporation is located to sign for the corporation, in addi-

tion to which, the seal, if any, of the corporation must be affixed."

Mr. McDowell: I submit the waiver of Company No. 2, filed December 14, 1923, as "Joint Exhibit No. 4."

(Said document, "Joint Exhibit No. 4," was in words and figures as follows):

[fol. 32] JOINT EXHIBIT #4

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence, April 26, 1928. Received Dec. 14, 1923. Engineering Div. Dec. 10th, 1923.

IT:En;T.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Brown Brothers Land and Lumber Company of * * * and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said * * * for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess profits, or war profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

Brown Bros. Land and Lumber Co. (S.), by Preston P. Joyes, Treas. (Seal.) D. H. Blair (S), Commissioner.

Dec. 15, 1923."

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addi-

tion to which, the seal, if any, of the corporation must be affixed."

I submit a waiver of Company No. 1, filed October 25, 1924, as "Joint Exhibit No. 5."

(Said document, "Joint Exhibit No. 5," was in words and figures as follows):

[fol. 33] JOINT EXHIBIT #5

"U. S. Board of Tax Appeals, Div. 10, Docket 9218

Admitted in Evidence, April 26, 1928. Feb. 24, 1926, Recd. October 25, 1924 (Date).

Income and Profits Tax Waiver

In pursuance of the provision of existing Internal Revenue Laws, W. P. Brown and Sons Lumber Company, a taxpayer, of Louisville, Kentucky, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918 and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by Section 277(b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

W. P. Brown & Sons Lumber Co. (S.), by J. G. Brown, Pres. (S).

(Received in Review Division, Feb. 26, 1925, Solicitor's Office.)"

Attest: LeRoy Olcott, (S), Secretary. (Seal.)

"If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the law of the State in which the corportion is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed."

Mr. McDowell: If your Honor please, this, I believe, concludes the presentation of all the necessary facts to the Board.

[fol. 34] The Member: Mr. Spalding, that is your agreed statement is it?

Mr. Spalding: Yes. Counsel has stated the facts correctly.

The Member: There is one possibility of discrepancy that I ought to be sure about. In so far as you in your oral agreement between you have attempted to state the effect of the waivers, so-called waivers, that statement must, of course, be taken for what it is worth and must give way to what the Board regards as proper significance of the waivers that have actually been in evidence; in other words, what I mean to say, you both understand, I assume, and intend that where it has been stated on the record that the petitioner or one of the other petitioners filed a waiver extending the period to such and such a date, for example, that must be taken only in the light of what the waiver itself that has been put in evidence provides, and you are not attempting to stipulate what the Board shall regard as the significance of the waivers.

Mr. McDowell: That is the understanding of the respondent.

The Member: I do not want either of you to be surprised in the event that when the Board examines the waivers it should find it meant something different from what you thought it meant.

Mr. Spalding: Mr. McDowell was endeavoring to identify the waivers. Your Honor's understanding of it is correct.

The foregoing statement contains all of the evidence, exhibits, stipulations, and rulings made at the hearing of this cause.

ORDER APPROVING STATEMENT OF EVIDENCE

Be it further remembered, that the foregoing contains all evidence, exhibits, stipulations, and rulings presented and made on the hearing of this proceeding; and in order that same may be preserved and made of record this statement of evidence is duly accepted, approved, signed, and ordered to be made of record in the above entitled proceedings this 27 day of February, 1929.

By the Board, (S.) J. M. Sternhagen, Member.

Service of the foregoing statement of evidence presented by petitioners is acknowledged. This statement of evidence is correct and we consent to its immediate approval by the [fols. 35 & 36] presiding member. This 23rd day of February, 1929.

C. M. Charest, General Counsel, Bureau of Int. Rev., Counsel for Respondent. (S.) W. W. Spalding, Attorney for Petitioner.

Now, March 1, 1929, the foregoing Statement of Evidence certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals. (Seal.)

BEFORE U. S. BOARD OF TAX APPEALS

PRAECIPE—Filed Jan. 29, 1929

The Clerk of the Board of Tax Appeals will please copy for purposes of the record for the appeal to the Circuit Court of Appeals, Sixth Circuit, the following portions of the record of the Board of Tax Appeals:

Docket entries.
Petition with exhibit.
Amendment to petition.
Answer.
Answer to amendment to petition.
Statement of Evidence.

Memorandum opinion.
Stipulation and form of order.
Judgment.
Petition for Review.
This Præcipe.

W. W. Spalding, Counsel for Petitioners.

We accept service of this præcipe. This January 29, 1929.
(Signed) C. M. Charest.

Now, March 1, 1929, the foregoing Præcipe with proof of service certified from the record as a true copy.

B. D. Gamble, Clerk, U. S. Board of Tax Appeals.
(Seal.)

[fol. 37] In United States Circuit Court of Appeals for the Sixth Circuit

Appearance of Counsel—Filed Mar. 14, 1929

J. W. Menzies, Clerk of said Court:

Please enter my appearance as Counsel for the Appellants.

W. W. Spalding, Woodward Bldg., Washington, D. C.

In United States Circuit Court of Appeals

Cause Argued and Submitted—Jan. 21, 1930

Before: Moorman, Mack and Hicks, J.J.

This cause is argued by W. W. Spalding for Appellants and by N. D. Keller for Appellee and is submitted to the Court.

In United States Circuit Court of Appeals

Decree—Filed Feb. 21, 1930

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the order or decree of the said Board of Tax Appeals in this cause be and the same is hereby reversed as to Brown Brothers Land & Lumber Company, and affirmed as to W. P. Brown & Sons Lumber Company.

[fol. 38] In United States Circuit Court of Appeals

Opinion—Filed Feb. 21, 1930

Before Moorman, Mack and Hicks, Circuit Judges.

Mack, Circuit Judge:

It is conceded by respondent that the question whether or not the deficiency assessment was collectible from Brown Brothers Land & Lumber Company is governed by Russell v. United States, 278 U. S. 181, decided since the order of redetermination was entered; therefore respondent consents to the reversal of that part of the Board's order which found that the collection of such deficiency was not barred by the statute of limitations.

On April 1, 1918, the other petitioner, W. P. Brown & Sons Lumber Company, filed its income and profits tax return for the year 1917; on December 13, 1920, it filed an unlimited waiver of "any and all statutory limitations as to the time within which assessments based upon such liability may be entered." On March 5, 1923, the Commissioner made a jeopardy deficiency assessment for the taxable year 1917 and in the same month petitioner filed a claim for the abatement thereof. Thereafter petitioner filed a further waiver dated December 10, 1923, in which it consented "to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return * * * for the years 1917 * * *." This waiver by its terms would have expired on December 10, 1924. On October 25, 1924, petitioner filed a similar waiver extending the period to "one year after the expiration of the statutory period of limitations within which assessment of taxes may be made for the year or years mentioned, or the statutory period of limitations as extended by § 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

On October 28, 1925, respondent notified petitioner of a partial allowance of the claim in abatement and of the definite determination of the amount of the deficiency. On November 18, 1925, petitioner filed an appeal with the Board of Tax Appeals from this determination of de- [fol. 39] ficiency. Subsequently the amount of the deficiency assessment; if any was to be paid, was stipulated by the parties; and the appeal was thereafter confined solely to the question of whether or not its collection was barred by the statute of limitations. From the decision of the Board finding that the collection was not so barred, petitioner has brought this appeal. The pertinent statutes are set forth in the margin.[1]

"Sec. 250. (d) The amount of * * * taxes due * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes * * * shall be begun, after the expiration of five years after the date when such return was filed * * *."

Revenue Act of 1924, c. 234, 43 Stat. 253:

"Sec. 274. (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed * * * the taxpayer * * * shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals. * * *

"(b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. * * * proceeding [for collection] shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired."

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[1] Revenue Act of 1921, c. 136, 42 Stat. 227:

"Sec. 277. (a) Except as provided in section 278 and in subsection (b) of section 274 and in subsection (b) of section 279.

* * * * * * *

"(2) The amount of income excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * * * *

"(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board."

"Sec. 278. * * *

"(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made.

"Sec. 280. If after the enactment of this Act the Commissioner determines that an assessment should be made in respect of any * * * tax imposed by * * * the Revenue Act of 1917 * * * the amount which should

[fol. 40] Petitioner contends: (1) that the waiver of December 13, 1920, cannot be relied upon because in terms it extended solely the right to assess and not the right to collect; (2) that both the waivers of December 10, 1923, and October 25, 1924, are inapplicable because they re-

late only to taxes due "under any return" and the assessment sought to be collected was not a return by petitioner but an additional assessment made by the Commissioner

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be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277."

Revenue Act of 1926, c. 27, 44 Stat. 9:

"Sec. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final. Nothwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

"Sec. 277. (a) Except as provided in section 278—

* * * * * * *

"(3) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without

assessment for the collection of such taxes shall be begun after the expiration of such period."

* * * * * * *

"(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision [a] of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

"Sec. 278. * * *

"(d) Where the assessment of any income, excess-profits, or war-profits tax imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

"(e) This section shall not bar a distraint or proceeding in court begun before the enactment of the Revenue Act of 1924; nor shall it authorize the assessment of a tax or the

[fol. 41] in 1923; (3) that such waivers are also invalid because they were filed after the expiration of the statutory period for enforcing collection; (4) and, finally, that these waivers by their terms expired prior to the entry of the Board's order, and since, as petitioner maintains § 277 (b) of the Act of 1924 is inapplicable to the right of collection, and the statute had run prior to the enactment of the Act of 1926, collection is now barred.

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collection thereof by distraint or by proceeding in court (1) if at the time of the enactment of this Act such assessment,

distraint or proceeding was barred by the statutory period of limitation properly applicable thereto, unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto or (2) contrary to the provisions of subdivision (a) of section 274 of this Act."

"Sec. 283. * * *

"(e) If any deficiency in any income war-profits, or excess-profits tax imposed * * * by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before the date of the enactment of this Act, and if the Commissioner, after the enactment of this Act, finally determines the amount of the deficiency, he is authorized to send by registered mail to the person liable for such tax notice of such deficiency, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such final determination the amount of the tax (whether deficiency or interest, penalty, or other addition to the tax) shall, except as provided in subdivision (h) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be collected and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand, and the provisions relating to claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act and in subdivision (i) of this section."

"(f) If any deficiency in any income, war-profits, or excess-profits tax imposed by * * * the Revenue Act of 1917, * * * was assessed before June 3, 1924, but was not paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal. In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and

the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (e) of this section, except as provided in subdivision (j) of this section and except that the person liable for the tax shall not be subject to the provisions of subdivision (d) of section 284."

"(1) In the case of any income, war-profits, or excess-profits tax imposed by prior Act of Congress, in computing the period of limitations provided in section 277 or 278 of this Act on the making of assessments and the beginning of distraint or a proceeding in court, the running of the statute of limitations shall be considered to have been suspended (in addition to the period of suspension provided for in subdivision [b] of section 277) for any period prior to the enactment of this Act during which the Commissioner was prohibited from making the assessment or beginning distraint or proceeding in court."

[fol. 42] Respondent contends: (1) that the waiver of December 10, 1923, although filed after the statute had run, is valid within § 250 (d) of the Revenue Act of 1921; (2) that by virtue of this waiver and that of October 25, 1924, the period for determination, assessment, and collection of the petitioner's taxes for the year 1917 was extended to December 10, 1925; (3) that the extension of time granted by § 277 (b) (2) and § 278 (d) of the Revenue Act of 1924 is applicable; (4) and that since the Act of 1926 was passed while petitioner's appeal was pending, the period for collection was also thereby extended until the decision of the Board should have become final.

(1) It is conceded that unless the right of collection has been kept alive by waivers and by the provisions of the Revenue Acts of 1924 and 1926, the collection of the unabated stipulated portion of the additional assessment for 1917 is now barred under § 250 (d) of the Revenue Act of 1921.

(2) We need not consider whether or not the unlimited waiver[2] of December 13, 1920, included collection, because in our judgment, the waiver of December 10, 1923, though given after the statute had run, was effective to revive the Government's right to assess and collect the taxes for 1917. Petitioner's argument that it was not, proceeds upon the double theory that § 250 (d) of the Act of 1921 necessarily requires that the waiver be signed before the statute has run, and that if the specified period has elapsed, the right as well as the remedy is extinguished. We find nothing in the text or content of § 250 (d) to require this construction. Statutes imposing limitations upon action by the United States are to be strictly construed in favor of the Government. United States v. Whited & Wheless, Ltd., 246 U. S. 552; Dupont de Nemours & Co. v. Davis, 264 U. S. 456. It is true that the section requires that the Commissioner also sign the waiver (Greylock Mills v. Commissioner, 31 F. [2d] [fol. 43] 655 [C. C. A. 2d]); and the Court of Appeals of the District of Columbia seems to be of the opinion that this precludes a waiver after the five years has run, on the theory that the Commissioner's consent would be but a futile gesture after his authority to collect the tax has ended. See Joy Floral Co. v. Commissioners, 29 F. (2d) 865.

The legislative purpose in requiring such consent is not apparent; if a contract is contemplated, it is difficult to see what consideration the Commissioner furnishes. See Greylock Mills v. Commissioner, 31 F. (2) 655, 657. Another reason, however, may be suggested. Oral waivers would have been subject to dispute and controversy as to form and meaning, and Congress made it clear that the taxpayer should not be bound except by a written waiver acceptable to the Commissioner. When a waiver is accepted, it is understood, if not impliedly agreed, that

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[2]This waiver would in any event have terminated on April 1, 1924, under the order of April 11, 1923, by which the Department ruled that all unlimited waivers should expire on April 1, 1924. Mim. 3085, Cum. Bull. I. R. II-1, p. 174; see Greylock Mills v. Commissioner, 31 F. (2d) 655, 657. Nevertheless, it would have sufficed to prevent the running of the statute until after the waiver of December 10, 1923, was filed.

proceedings for the collection of the tax will be suspended until intensive and thorough consideration of the taxpayer's claimed exemptions, valuations, and the like will have been made. his would frequently result in a delay of the assessment and collection until after the statutory period had run, and as an incident of orderly administrative procedure it was essential that the Commissioner have full knowledge of the action taken and, therefore, that such a waiver be not accepted indiscriminately by a Collector or revenue agent. This may well account for the statutory requirement that to be effective, the waiver be signed by the Commissioner. The time of his signature, however, was not vital; as recently stated by the Court of Claims, after a thorough examination of the contention that a prior signature was necessary, "to hold that the statute requires the Commissioner to consent to the waiver before the expiration of the period of limitations is to engraft upon the statute something which certainly is not contained within its provisions nor, as we think, is there any reason to infer that such was the intent of Congress." Stange v. United States, Ct. Clms., November 4, 1929, United States Daily, November 8, 1929, pp. 2262-63. See also Wells Bros. Co. v. Commissioner, 16 B. T. A. 79; Harris Co. v. Commissioner, 16 B. T. A. 469.

[fol. 44] The contention that the right as well as the remedy was barred and that consequently there was no consideration for petitioner's waiver cannot be accepted. This problem has recently arisen in connection with the asserted unconstitutionality of §§ 607 and 611 of the Revenue Act of 1928 (45 Stat. 874-75, 26 U. S. C. A. 2607, 2611) by which Congress in certain cases removed the bar of the statute after it had once fallen. It has been held in a number of cases that the bar imposed by § 250 (d) of the Act of 1918 (40 Stat. 1083) and similar provisions in other acts goes merely to the remedy and not to the right,[3]

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[3] This is perhaps confirmed by the fact that § 1106 (a) of the Revenue Act of 1926 (44 Stat. 113, 26 U. S. C. A. § 1249) specifically provided that the bar of the statute "shall not only operate to bar the remedy but shall extinguish the liability." This section, however, was repealed as of its effective date by § 612 of the Act of 1928. 45 Stat. 875.

and that the legislature which imposed the bar may remove it. Huntley v. Gile, 32 F. (2d) 857 (C. C. A. 9th); Wright & Taylor Co. v. Lucas, W. D. Ky., decided July 26, 1929; Regla Coal Co. v. Bowers, S. D. N. Y., decided by the writer, November 13, 1929. In any event, the bar of the remedy, provided by the ordinary statute of limitations, may be effectively waived without consideration. See Williston, Contracts, §§ 160-84.

(3) Petitioner's contention that the waivers of 1923 and 1924 include taxes due only under its return needs little discussion. The argument is that the language "due under any return made by or on behalf of said taxpayer" in the waiver limits the consent to a later determination, assessment, and collection of only such taxes as may have been shown to be due by that return. Petitioner's return for 1917 is not in evidence, and for aught that appears in the record before us, the tax here involved might have been assessed on the basis of information contained in the return, and would therefore be a tax due under that return. But aside from this possibility, we are clearly of the opinion that such a narrow construction of the waivers would not be warranted either by the instruments read as a whole or by the statute pursuant to which they were filed. The taxpayer is required to make a return so that the Commissioner may have the information necessary to [fol. 45] a correct determination of its tax liability, and if such information be incomplete, the Commissioner must supply the deficiency from other sources. Clearly, it is the entire tax liability to which the inquiry is directed; it is to determine this that the Commissioner accepts the waiver and delays assessment and collection. This broad purpose, implicit in the whole arrangement, is not to be thus restricted by a narrow construction of the phrase "due under any return" in this waiver.

(4) The series of waivers purported to extend the period for the determination, assessment, and collection of the 1917 tax to December 10, 1925, or for the period provided in § 277 (b) of the Revenue Act of 1924. On October 28, 1925, the Commisioner sent his notice of final determination, and on November 18, 1925, petitioner appealed to the Board of Tax Appeals. Since no proceeding to collect

these taxes was begun prior to December 10, 1925, the continuance of the right under this waiver depends upon the construction of § 277 (b) and related sections of the 1924 Act and/or § 283 (f) of the 1926 Act. Petitioner asserts that § 277 (b) of the 1924 Act relates only to the right of assessment and not to the right of collection; that because of its reference thereto in the waiver of October 25, 1924, that waiver is similarly limited.

Section 280 provides that if, after June 2, 1924, the Commissioner determines that an assessment of 1917 taxes, "whether as deficiency or as interest, penalty, or other addition to the tax," should be made, the other provisions of the Act of 1924 are applicable. Section 274 (a) provides for the appeal of such determination to the Board of Tax Appeals, and § 277 (b) extends the period during which such assessment may be made until after the final decision of the Board. Thereafter, § 278 (d) allows the Government six years in which to collect the assessment.

In Russell v. United States, 278 U. S. 181, it was held that the extension granted by § 278 was limited to cases in which the assessment in question had been made after June 2, 1924, the effective date of the 1924 Act. That was a case of a direct proceeding by the United States to collect taxes: it was not a case involving an appeal to the [fol. 46] Board of Tax Appeals. The opinion says of the Act of 1924, that

"It made provision for taxes thereafter to accrue; also for those already due. It distinguished between existing assessments and those which were to follow. It established a Board of Tax Appeals and gave the right of appeal thereto whenever thereafter the Commissioner should propose to assess for deficiency. * * * To secure proper action by the Board might require considerable time, and this was provided for by extending the limitation to six years after assessment. But the taxpayer was afforded protection against improper action by the Commissioner through an appeal before any assessment could be actually imposed—a new and valuable right."

If, in the instant case, the definite and final assessment of this deficiency tax was prior to June 2, 1904, then the Russell case governs it.

The assessment of March, 1923, was a jeopardy assessment to which petitioner immediately filed a claim in abatement. The final determination of this assessment and its collection would await the Commissioner's action on the claim for abatement, under the common practice (See H. R. Rep. No. 2, 70th Cong., 1st Sess., p. 34; H. R. Doc. No. 578, 69th Cong. 2d Sess., u. 3 et seq., cited it Regla Coal Co. v. Bowers, supra); that such was petitioner's understanding is shown by its petition to the Board of Tax Appeals in which it states that the deficiency letter of October 28, 1925, "evidences the final determination by the Commissioner of the 1917 deficiency." Had it not been so, petitioner would have had no right of appeal to the Board under § 280 of the Act of 1924; this requires a final determination, necessarily prior to final assessment. Cf. United States v. Board of Tax Appeals, 16 F. (2d) 337. The fact that the amount of the deficiency as finally determined was covered by the jeopardy assessment theretofore made, did not render it any the less a deficiency which the Commissioner on October 28, 1925, finally determined should be assessed. The Commissioner might have abated the former assessment in its entirety (as he [fol. 47] did in part) and in the absence of a written settlement have determined a new deficiency assessment at any time before December 10, 1925. See L. Loewy & Sons, Inc. v. Commissioner, 31 F. (2d) 652 (C. C. A. 2d); Holmquist v. Blair, 35 F. (2d) 10 (C. C. A. 8th). And such new determination would clearly fall within § 280 and § 274 (a). Petitioner availed itself of the provisions of the Act of 1924 for a review of the determination of its tax liability; it cannot now deny the applicability of related sections of that act. Accordingly, we conclude that since the deficiency determination of October 28, 1925, came within § 280, and was appealed under § 274 as being a determination before assessment, the extension of time granted by § 277 (b) and § 278 (d) has not expired.

(5) But assuming that the jeopardy assessment of March 5, 1923, was the only assessment, we are of the opinion that the period for collection was extended by § 283 (f) of the Act of 1926. That section specifically provides for a review by the Board of Tax Appeals, if an assessment was made "before June 3, 1924, but was not

paid in full before that date, and if the Commissioner after June 2, 1924, but before the enactment of this Act finally determined the amount of the deficiency, and if the person liable for such tax appealed before the enactment of this Act to the Board and the appeal is pending before the Board at the time of the enactment of this Act, the Board shall have jurisdiction of the appeal." Moreover in such case § 274 (a) provides (with exceptions not material to this discussion) that no distraint or proceeding for the collection of a deficiency shall be begun or prosecuted if a petition has been filed with the Board of Tax Appeals until the decision of the Board has become final. Furthermore, the beginning of such a proceeding or distraint during the time this prohibition is in force may be enjoined, contrary to the general rule. Peerless Woolen Mills v. Rose, 28 F. (2d) 661. Section 277 (b) provides that the running of the statute of limitations against the beginning of a proceeding for collection, as well as against the making of assessments, "shall [after the mailing of the necessary notice] be suspended for the period during which the Commissioner is prohibited from making the assessment [fol. 48] or beginning distraint, or a proceeding in court and for 60 days thereafter." See also Reg. 69, Art. 1232 and 1271.

Section 283 (1) provides that in the case of any tax imposed by a prior act, the running of the statute shall be considered to have been suspended (in addition to the period of suspension provided in § 277 [b] (for any period prior to the enactment of the Act of 1926 during which the Commissioner was prohibited from making an assessment or beginning distraint or proceeding in court.

In the case at bar, the petition to the Board of Tax Appeals was filed on November 18, 1925, before the expiration of the last waiver on December 10, 1925, and thus was pending before the Board on February 26, 1926, the date on which the Act of 1926 became effective. Consequently, § 283 (f) and related sections of that Act are fully applicable.

Petitioner insists, however, that both § 277 (b) and § 283 (f) of the Act of 1926 are limited by § 278 (e) of that Act. The latter section provides that "This section * * * shall not authorize the assessment * * * or collection

* * * (1) if at the time of the enactment of this Act [such proceeding] was barred * * * unless prior to the enactment of this Act the Commissioner and the taxpayer agreed in writing thereto, or (2) contrary to the provisions of subdivision (a) of section 274 of this Act" The argument is that since the last waiver by its terms expired on December 10, 1925, that is, prior to the effective date of the Act of 1926, this section bars collection. We cannot accept this interpretation. The authority for extending the time for collection under the facts of the case at bar is found in § 283 (f), and not in § 278; the prohibition in § 278 (e) however, is by its language clearly limited to assessments and collections authorized by that section, that is, by the preceding alphabetical subdivisions of § 278. Moreover, the latter part of § 278 (e) recognizes and indeed reinforces the prohibition against collection while a case is pending before the Board, contained in § 274 (a). (This § 274 [a] is incorporated by reference in § 283 [f] which authorizes collection in the present case. Cf. § 283 [f] and § 283 [e].) Obviously, then, the provisions of § 278 (e) were not intended to be inconsistent with § 274 [fol. 49] (a) or subdivisions (e) and (f) of § 283. If we are to accept petitioner's contention that § 278 (e) is inconsistent with the interpretation we have given § 283 (f), we must necessarily hold that § 278 (e) in effect nullifies the clear provisions of § 283 (f). Not only is there nothing in the statute to warrant this interpretation, but the interrelations of § 274 (e) and § 283 (f) makes the contrary clear.

Order reversed as to Brown Brothers Land & Lumber Company, and affirmed as to W. P. Brown & Sons Lumber Company.

[fol. 50] In United States Circuit Court of Appeals

Motion to Stay Mandate—Filed March 15, 1930

May it please the Court:

Your petitioner, W. P. Brown & Sons Lumber Company, respectfully presents this, its application for an order staying the issuance of the Mandate in the above entitled case, under the provisions of Section 8 (d) of the Act of Con-

gress of February 13, 1925, (U. S. Code, Title 28, Section 350), and in support thereof presents the following:

This petitioner is desirous of making application to the Supreme Court of the United States for the issuance of a writ of certiorari to review the judgement of the Court entered herein on Febrauary 21, 1930.

The Supreme Court has, on March 3, 1930, granted an application for writ of certiorari to review the judgment of the Court of Claims in Stange v. United States, decided November 4, 1929, relied upon by the Court; and also in Graham v. Goodcell, involving the same issue presented in Huntley v. Gile, 32 F. (2d) 857, also relied upon by the Court.

Petitioner further shows to the Court that the payment of the tax proposed against this petitioner is secured by a good and solvent bond filed with the United States Board of Tax Appeals at the time the appeal was taken to this Court.

Respectfully submitted, W. W. Spalding, Attorney for Petitioner, W. P. Brown & Sons Lumber Company, 1021 Tower Bldg., Washington, D. C.

[fol. 51] In United States Circuit Court of Appeals

Præcipe for Transcript—Filed March 15, 1930

To Clerk, United States Circuit Court of Appeals for the Sixth Circuit:

Please make up a certified record in the above case to be used by the petitioner, W. P. Brown & Sons Lumber Company, in an application to the Supreme Court of the United States for the issuance of a writ of certiorari to review the decision rendered herein on February 21, 1930, and include therein the following:

(1) Record heretofore printed and filed in this Court.
(2) Argument and submission.
(3) Opinion of this Court.
(4) Judgment of this Court.
(5) Stay of Mandate.
(6) This Designation.

W. W. Spalding, Attorney for Petitioner.

[fo. 52] In United States Circuit Court of Appeals

Order Staying Mandate—Filed March 17, 1930

Ordered, that motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date,—provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record and brief have been filed and that proof by affidavit of notice thereof under paragraph 3 of rule 38 of the Supreme Court has been given, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof or, if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 53] Supreme Court of the United States

Order Allowing Certiorari—Filed June 2, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted, the briefs and argument to be limited to the question of the validity and effect of the waivers.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,026. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 115. W. P. Brown & Sons Lumber Company, Petitioner, vs. Commissioner of Internal Revenue. Petition for writ of certiorari and exhibit thereto. Filed May 14, 1930. File No. 35,026.